

No. 11898

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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CASCADE COUNTY, MONTANA and THE  
HOME INSURANCE COMPANY, NEW  
YORK,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Montana

**FILED**

JUL 12 1945

PAUL R. O'BRIEN,  
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

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Billings, Montana,  
Attorneys for Defendant and  
Appellee. [1\*]

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and  
for the District of Montana, Great Falls  
Division

No. 993

CASCADE COUNTY, MONTANA, and THE  
HOME INSURANCE COMPANY, New York,  
on behalf of itself and all other insurance com-  
panies, similarly situated,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Be It Remembered that on July 31, 1947, a Com-  
plaint was duly filed herein, in the words and figures  
following, to wit: [2]

### COMPLAINT

Come Now the Plaintiffs and for a Cause of  
Action Complain and Allege as Follows:

#### I.

The jurisdiction of this court is claimed on the  
ground that the plaintiff, Cascade County, is and  
at all times mentioned herein was a municipal cor-  
poration duly organized and existing under the  
laws of the State of Montana; and that the plaintiff,  
The Home Insurance Company, New York, is and  
at all times mentioned herein was a private corpo-  
ration duly organized and existing under the laws  
of the State of New York; and that the United



States of America is the real party defendant in interest under the Federal Tort Claims Act of August 2, 1946.

## II.

On August 9th, 1946, in the County of Cascade, State of Montana, United States Army Air Forces personnel, whose names are unknown to these plaintiffs, all employees and officers of the defendant, acting within the scope of their office and employment, flew three A-26 bomber type aircraft in such a reckless, careless and negligent manner that one of said aircraft crashed into, upon and against a barn, generally known and described as [3] Horse Barn "A", located on the Cascade County Fair Grounds, then and there the property of the plaintiff, Cascade County, and thereby damaged, and caused a fire which entirely destroyed said property to the damage of said plaintiff, Cascade County, in the total sum of Eighteen Thousand Six Hundred Eighty-five Dollars (\$18,685.00).

## III.

The plaintiff, The Home Insurance Company, New York, brings this action on behalf of itself and all other insurance companies similarly situated which have made payment under their respective insurance policies to the plaintiff, Cascade County, on account of the damage to the above described property of said Cascade County caused by the defendant as hereinbefore alleged, and which insurance companies are subrogees of the said Cascade County to the extent of such payments. The said

subrogee insurance companies are approximately seventy-one (71) in number and it is therefore impracticable to bring them all before this court.

#### IV.

The plaintiff, The Home Insurance Company, New York, and all said insurance companies similarly situated on whose behalf this action is brought, are and at all times mentioned herein were corporations duly authorized under the laws of the State of Montana to issue policies of fire insurance and are and at all times herein mentioned were engaged in such business in the County of Cascade, State of Montana.

#### V.

In consideration of the premiums paid to it, the plaintiff, The Home Insurance Company, New York, executed and issued to the plaintiff, Cascade County, five policies of insurance, as follows:

Policy No.	Effective Dates	Face Amount
969	1 January 1942 - 1 January 1947.....	\$ 1,000.00
1013	1 January 1946 - 1 January 1951.....	4,000.00
1059	1 January 1945 - 1 January 1950.....	4,000.00
1060	1 January 1945 - 1 January 1947.....	4,000.00
9961	1 January 1945 - 1 January 1950.....	10,000.00

insuring the said Cascade County in the sum of Twenty-three Thousand Dollars (\$23,000.00) against loss or damage, by fire or aircraft, to any and all property of the said Cascade County. All the said policies of insurance being similar in their terms, except as to those matters specifically set out above, a copy of policy number 9961 is attached hereto as Exhibit "A" and by this reference made a part of this complaint as though fully set out herein.

## VI.

In addition to the plaintiff, The Home Insurance Company, New York, all other insurance companies similarly situated and on whose behalf this action is brought, in consideration of the premiums paid to each respectively, did, on various dates all prior to the date of the loss and damage set out hereinabove, execute and issue to the plaintiff, Cascade County, policies of insurance of various face amounts, insuring the said Cascade County in the total sum of Seven Hundred Forty-eight Thousand Six Hundred Dollars (\$748,600.00) against loss or damage, by fire or aircraft, to any and all property owned by said Cascade County; and all of which policies were similar in terms to Exhibit "A" hereto, except as to those matters set out herein, and all of which policies were in full force and effect on the 9th day of August, 1946.

## VII.

By reason of the damage and loss caused to the plaintiff, Cascade County, as set out hereinabove, the plaintiff, The Home Insurance Company, New York, and all other insurance companies similarly situated on whose behalf this action is brought, each became liable under its respective policies, or policy, of insurance to pay its proportionate share of said loss and damage, and on the 28th day of December, 1946, did pay to the said Cascade County, the total sum of Eight Thousand Five Hundred and Fifty Dollars (\$8,550.00), as follows, to-wit: [5]

Policy Number	Company	Face Value of Policy	Proportionate Share Paid
1865	Aetna Insurance Company.....	\$ 12,500	\$ 142.77
1953	Aetna Insurance Company.....	5,000	57.11
1969	Aetna Insurance Company.....	2,500	28.55
3158	Aetna Insurance Company.....	5,000	57.11
3176	Aetna Insurance Company.....	2,000	22.84
218573	Agricultural Insurance Company.....	10,000	114.21
3014	American Alliance Ins. Co.....	2,000	22.84
632856	American Alliance Ins. Co.....	18,500	211.29
M-446	American Eagle Fire Ins. Co.....	4,000	45.69
933	American Eagle Fire Ins. Co.....	4,000	45.69
1107	American Eagle Fire Ins. Co.....	5,000	57.11
58146	American & Foreign Ins. Co.....	2,500	28.55
317276	American Insurance Company.....	8,000	91.37
U400052	Anglo-American Underwriters .....	10,000	114.21
56976	Associated Fire & Marine Ins. Co.....	8,500	97.08
1020	Baltimore American Ins. Co.....	4,000	45.69
20132	Baltimore American Ins. Co.....	5,000	57.11
20176	Baltimore American Ins. Co.....	2,000	22.84
845839	Boston Insurance Company.....	2,000	22.84
447513	Camden Fire Ins. Association.....	2,000	22.84
458891	Camden Fire Ins. Association.....	6,000	68.53
464583	Camden Fire Ins. Association.....	5,000	57.11
239861	Capital Fire Insurance Company.....	6,000	68.53
412106	Capital Fire Insurance Company.....	2,000	22.84
208	City of New York Ins. Co.....	1,000	11.42
343	City of New York Ins. Co.....	2,000	22.84
423	City of New York Ins. Co.....	7,000	79.96
354	Columbia Fire Ins. Co. (Dayton).....	2,000	22.84
403618	Columbia Insurance Co. (N. Y.).....	7,500	85.66
544	Concordia Fire Insurance Co.....	4,000	45.69
556	Concordia Fire Insurance Co.....	5,000	57.11
557	Concordia Fire Insurance Co.....	1,000	11.42
53932	Connecticut Fire Insurance Co.....	6,000	68.53
308044	Connecticut Fire Insurance Co.....	5,000	57.11
3789	Continental Insurance Company.....	5,000	57.11
9189	Continental Insurance Company.....	4,000	45.69
10867	Continental Insurance Company.....	8,000	91.37
10886	Continental Insurance Company.....	4,000	45.69
10910	Continental Insurance Company.....	4,000	45.69
13776	Continental Insurance Company.....	20,000	228.43

Policy Number	Company	Face Value of Policy	Proportionate Share Paid
271053	Eagle Fire Co. of N. Y.....	2,500	28.55
F 352277	Eureka-Security Fire & Marine.....	2,000	22.84
1738	Fidelity & Guaranty Fire Corp.....	2,000	22.84
3364	Fidelity & Guaranty Fire Corp.....	3,000	34.26
4856	Fidelity-Phenix Fire Ins. Co.....	10,000	114.21
105	Firemen's Insurance Company.....	8,000	91.37
158	Firemen's Insurance Company.....	2,000	22.84
180	Firemen's Insurance Company.....	4,500	51.40
232	Firemen's Insurance Company.....	10,000	114.21
1539F-1747	First National Insurance Co.....	2,000	22.84
1539F-2233	First National Insurance Co.....	10,000	114.21
5813F-1156	First National Insurance Co.....	4,000	45.69
748	Franklin Fire Insurance Co.....	10,000	114.21
3008	Franklin Fire Insurance Co.....	7,000	79.96
3009	Franklin Fire Insurance Co.....	2,000	22.84
3363	Franklin Fire Insurance Co.....	7,000	79.96
9601	Granite State Fire Insurance Co.....	1,000	11.42
16811	Granite State Fire Insurance Co.....	1,000	11.42
425006	Great American Insurance Co.....	5,000	57.11
6319	Hanover Fire Insurance Co.....	7,500	85.66
8121	Hartford Fire Insurance Co.....	5,000	57.11
8342	Hartford Fire Insurance Co.....	3,800	43.40
13419	Hartford Fire Insurance Co.....	10,000	114.21
643	Hibernia Underwriters .....	14,500	165.61
741	Hibernia Underwriters .....	2,500	28.55
839	Hibernia Underwriters .....	2,500	28.55
988	Hibernia Underwriters .....	10,000	114.21
969	Home Insurance Company.....	1,000	11.42
1013	Home Insurance Company.....	4,000	45.69
1059	Home Insurance Company.....	4,000	45.69
1060	Home Insurance Company.....	4,000	45.69
9961	Home Insurance Company.....	10,000	114.21
64490	Homeland Insurance Company.....	3,000	34.26
64611	Homeland Insurance Company.....	3,000	34.26
82681	Homeland Insurance Company.....	1,000	11.42
83400	Homeland Insurance Company.....	2,000	22.84
92437	Homeland Insurance Company.....	3,000	34.26
06067	Home Underwriters Agency.....	2,400	27.41
06076	Home Underwriters Agency.....	2,400	27.41
06118	Home Underwriters Agency.....	9,000	102.79



Policy Number	Company	Face Value of Policy	Proportionate Share Paid
LS818443F	London & Lancashire Ins. Co.....	2,000	22.84
51561	Maryland Insurance Company.....	5,000	57.11
51564	Maryland Insurance Company.....	2,000	22.84
1001	Massachusetts Fire & Marine.....	6,000	68.53
513334	Mercantile Insurance Company.....	5,000	57.11
556017	Mercantile Insurance Company.....	3,000	34.26
403278	Mercury Insurance Company.....	2,000	22.84
511009	Merchants Fire Assurance Corp.....	5,000	57.11
2258	Minneapolis Fire & Marine.....	8,000	91.37
3005	Minneapolis Fire & Marine.....	3,000	34.26
25072	Minneapolis Fire & Marine.....	7,000	79.96
50353	Minneapolis Fire & Marine.....	2,000	22.84
72346	Minneapolis Fire & Marine.....	3,000	34.26
72385	Minneapolis Fire & Marine.....	2,000	22.84
73637	Minneapolis Fire & Marine.....	2,000	22.84
73872	Minneapolis Fire & Marine.....	3,000	34.26
321	National-Ben Franklin Ins. Co.....	1,000	11.42
347	National-Ben Franklin Ins. Co.....	2,000	22.84
464	National-Ben Franklin Ins. Co.....	2,000	22.84
488	National-Ben Franklin Ins. Co.....	2,000	22.84
489	National-Ben Franklin Ins. Co.....	1,000	11.42
1100	National Liberty Insurance Co.....	2,000	22.84
1131	National Liberty Insurance Co.....	2,000	22.84
321	New Brunswick Fire Insurance Co.....	13,000	148.48
282037	New Hampshire Fire Insurance Co.....	5,000	57.11
358274	New York Underwriters.....	3,000	34.26
364019	New York Underwriters.....	5,000	57.11
364048	New York Underwriters.....	1,000	11.42
815383	Niagara Fire Insurance Company.....	6,000	68.53
892841	Northern Assurance Company.....	10,000	114.21
15132	North River Underwriters Agency.....	10,000	114.21
4206161	North River Insurance Company.....	5,000	57.11
2092	Norwich Union Fire Ins. Society.....	10,000	114.21
145-7586	Northwestern Mutual Fire Ass'n.....	3,000	34.26
A168206	Occidental Insurance Company.....	7,000	79.96
105658	Old Colony Insurance Company.....	5,000	57.11
107332	Old Colony Insurance Company.....	5,000	57.11
OS835967F	Orient Insurance Company.....	1,400	15.99
OS836013F	Orient Insurance Company.....	3,400	38.83
A950309	Orient Insurance Company.....	400	4.57
A952228	Orient Insurance Company.....	1,400	15.99

Policy Number	Company	Face Value of Policy	Proportionate Share Paid
B996560	Orient Insurance Company.....	1,400	15.99
26656	Pacific Fire Insurance Co.....	3,000	34.26
26660	Pacific Fire Insurance Co.....	5,000	57.11
2800800	Pacific Fire Insurance Co.....	2,000	22.84
275530	Pennsylvania Fire Insurance Co.....	5,000	57.11
48450	Phoenix Assurance Company.....	10,000	114.21
77012	Phoenix Insurance Company.....	1,000	11.42
772177	Providence Washington Ins. Co.....	10,000	114.21
417937	Queen Insurance Company.....	4,000	45.69
444007	Queen Insurance Company.....	5,000	57.11
75411	Rocky Mountain Fire Ins. Co.....	3,000	34.26
76774	Rocky Mountain Fire Ins. Co.....	10,000	114.21
77884	Rocky Mountain Fire Ins. Co.....	10,000	114.21
78070	Rocky Mountain Fire Ins. Co.....	6,000	68.53
84236	Rocky Mountain Fire Ins. Co.....	1,000	11.42
84238	Rocky Mountain Fire Ins. Co.....	5,000	57.11
84352	Rocky Mountain Fire Ins. Co.....	3,000	34.26
84353	Rocky Mountain Fire Ins. Co.....	2,000	22.84
86841	Rocky Mountain Fire Ins. Co.....	5,000	57.11
440492	Royal Insurance Company.....	5,000	57.11
7436	St. Paul Fire & Marine Ins. Co.....	5,000	57.11
62491	St. Paul Fire & Marine Ins. Co.....	2,500	28.55
S264676	Springfield Fire & Marine Ins. Co.....	3,000	34.26
857	Twin City Fire Insurance Co.....	4,500	51.40
885	Twin City Fire Insurance Co.....	7,000	79.95
959	Twin City Fire Insurance Co.....	1,500	17.13
1041	Twin City Fire Insurance Co.....	1,500	17.13
2034	Washington Underwriters Dept.....	5,000	57.11
2064	Washington Underwriters Dept.....	1,000	11.42
853	Westchester Fire Insurance Co.....	1,000	11.42
203581	Westchester Fire Insurance Co.....	3,000	34.26
203589	Westchester Fire Insurance Co.....	7,000	79.95
A188004	Western National Insurance Co.....	4,000	45.69
A188036	Western National Insurance Co.....	2,000	22.84
A188953	Western National Insurance Co.....	4,000	45.69
A200700	Western National Insurance Co.....	7,000	79.95
A203037	Western National Insurance Co.....	2,000	22.84
01010	World Fire & Marine Ins. Co.....	5,000	57.11
01041	World Fire & Marine Ins. Co.....	3,000	34.26
		<hr/>	<hr/>
		\$748,600	\$8,550.00

## VIII.

By reason of the foregoing payments, the plaintiff, The Home Insurance Company, New York, and each of the other insurance companies similarly situated on whose behalf this action is brought, became entitled to be subrogated to all the rights of the said plaintiff, Cascade County, against the United States of America, defendant, arising from the loss and damage set out in paragraph II above, to the full extent of such payments. [8]

Wherefore, the plaintiffs pray judgment against the United States of America in the sum of Eighteen Thousand Six Hundred Eighty-five Dollars (\$18,685.00) together with costs and such other and further relief as may be proper.

/s/ ROBERT WEIR,

Chairman of the Board of County Commissioners,  
Cascade County, Montana.

/s/ LARRY T. DIRINGER,

Manager, The Home Insurance Company, New  
York, 419-425 Ford Building, Great Falls,  
Montana.

/s/ H. R. EICKEMEYER,

/s/ LA RUE SMITH, JR.,

Attorneys for the Plaintiffs.

State of Montana,  
County of Cascade—ss.

Robert Weir, being duly sworn, deposes and says that he resides in Great Falls, Montana; that he is



the duly elected Chairman of the Board of County Commissioners of the County of Cascade, State of Montana; and that he has read the foregoing complaint and knows the contents thereof and verily believes the facts stated in the pleading to be true.

/s/ ROBERT WEIR.

Subscribed and sworn to before me this 30th day of July, A.D. 1947.

[Seal] /s/ H. R. EICKEMEYER,

Notary Public for the State of Montana, residing at Great Falls, Montana.

My commission expires March 1, 1948. [10]

State of Montana,

County of Cascade—ss.

Larry T. Diringer, being duly sworn, deposes and says that he resides in Great Falls, Montana; that he is the Manager and general agent of The Home Insurance Company, New York, in and for the State of Montana; and that he has read the foregoing complaint and knows the contents thereof and verily believes the facts stated in the pleading to be true.

/s/ LARRY T. DIRINGER.

Subscribed and sworn to before me this 26th day of July, A.D. 1947.

[Seal] /s/ LA RUE SMITH, JR.,

Notary Public for the State of Montana, residing at Great Falls, Montana.

My commission expires July 26, 1949. [11]

No. 9961

STOCK COMPANY

9801

RENEWAL OF NO.

# The Home Insurance Company

NEW

YORK

ORGANIZED 1853



AMOUNT . . . \$ 10,000.00    RATE 2.359    PREMIUM \$ 235.90    } TOTAL  
 EXTENDED COVERAGE\*    RATE .293    PREMIUM \$ 29.30    } PREMIUM \$ 265.20

\*No insurance attaches in connection with Extended Coverage Perils unless "Rate" and "Premium" is specified above and Extended Coverage endorsement is attached to this policy.

In Consideration of the Provisions and Stipulations Herein or Added Hereto

AND OF TWO HUNDRED SIXTY FIVE AND 20/100--- DOLLARS PREMIUM  
 this company, for the term } from the 1ST day of JANUARY, 1945 { at noon, Standard Time, at  
 of five years } to the 1ST day of JANUARY, 1950 { location of property involved,

to an amount not exceeding TEN THOUSAND AND NO/100 Dollars,

does insure COUNTY OF CASCADE, STATE OF MONTANA

and legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all DIRECT LOSS BY FIRE, LIGHTNING AND BY REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, EXCEPT AS HEREINAFTER PROVIDED, to the property described hereinafter while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere.

Assignment of this policy shall not be valid except with the written consent of this Company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

In witness whereof, this Company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized Agent of this Company at

GREAT FALLS, MONT. 3801-72

*W. B. Beyer*  
 "Secretary

*J. B. Smith*  
 President

Countersigned  
 this 26th day of December 1944

FRARY & MULLINGHAM, INC. Agent.  
 BY: *B. E. Wood*

1 Concealment, This entire policy shall be void if, whether  
2 fraud. before or after a loss, the insured has will-  
3 fully concealed or misrepresented any ma-  
4 terial fact or circumstance concerning this insurance or the  
5 subject thereof, or the interest of the insured therein, or in case  
6 of any fraud or false swearing by the insured relating thereto.  
7 Uninsurable This policy shall not cover accounts, bills,  
8 and currency, deeds, evidences of debt, money or  
9 excepted property. securities; nor, unless specifically named  
10 hereon in writing, bullion or manuscripts.  
11 Perils not This Company shall not be liable for loss by  
12 included. fire or other perils insured against in this  
13 policy caused, directly or indirectly, by: (a)  
14 enemy attack by armed forces, including action taken by mili-  
15 tary, naval or air forces in resisting an actual or an immediately  
16 impending enemy attack; (b) invasion; (c) insurrection; (d)  
17 rebellion; (e) revolution; (f) civil war; (g) usurped power; (h)  
18 order of any civil authority except acts of destruction at the time  
19 of and for the purpose of preventing the spread of fire, provided  
20 that such fire did not originate from any of the perils excluded  
21 by this policy; (i) neglect of the insured to use all reasonable  
22 means to save and preserve the property at and after a loss, or  
23 when the property is endangered by fire in neighboring prem-  
24 ises. (j) nor shall this Company be liable for loss by theft.  
25 Other insurance. Other insurance may be prohibited or the  
26 amount of insurance may be limited by en-  
27 dorsement attached hereto.  
28 Conditions suspending or restricting insurance. Unless other-  
29 wise provided in writing added hereto this Company shall not  
30 be liable for loss occurring  
31 (a) while the hazard is increased by any means within the con-  
32 trol or knowledge of the insured; or  
33 (b) while a described building, whether intended for occupancy  
34 by owner or tenant, is vacant or unoccupied beyond a period of  
35 sixty consecutive days; or  
36 (c) as a result of explosion or riot, unless fire ensue, and in  
37 that event for loss by fire only.  
38 Other perils Any other peril to be insured against or sub-  
39 ject of insurance to be covered in this policy  
40 shall be by endorsement in writing hereon or  
41 added hereto.  
42 Added provisions. The extent of the application of insurance  
43 under this policy and of the contribution to  
44 be made by this Company in case of loss, and any other pro-  
45 vision or agreement not inconsistent with the provisions of this  
46 policy, may be provided for in writing added hereto, but no pro-  
47 vision may be waived except such as by the terms of this policy  
48 is subject to change.  
49 Waiver. No permission affecting this insurance shall  
50 exist, or waiver of any provision be valid,  
51 unless granted herein or expressed in writing  
52 added hereto. No provision, stipulation or forfeiture shall be  
53 held to be waived by any requirement or proceeding on the part  
54 of this Company relating to appraisal or to any examination  
55 provided for herein.  
56 Cancellation This policy shall be cancelled at any time  
57 of policy. at the request of the insured, in which case  
58 this Company shall, upon demand and sur-  
59 render of this policy, refund the excess of paid premium above  
60 the customary short rates for the expired time. This pol-  
61 icy may be cancelled at any time by this Company by giving  
62 to the insured a five days' written notice of cancellation with  
63 or without tender of the excess of paid premium above the pro-  
64 rata premium for the expired time, which excess, if not ten-  
65 dered, shall be refunded on demand. Notice of cancellation shall  
66 state that said excess premium (if not tendered) will be re-  
67 funded on demand.  
68 Mortgage If loss hereunder is made payable, in whole  
69 interest and or in part, to a designated mortgagee not  
70 obligations. named herein as the insured, such interest in  
71 this policy may be cancelled by giving to such  
72 mortgagee a two days' written notice of can-  
73 cellation.  
74 If the insured fails to render proof of loss such mortgagee, upon  
75 notice, shall render proof of loss in the form herein specified  
76 within sixty (60) days thereafter and shall be subject to the pro-  
77 visions hereof relating to appraisal and time of payment and of  
78 bringing suit. If this Company shall claim that no liability ex-  
79 ists as to the mortgagee, be subrogated to all the mort-  
80 gagee's rights of recovery, but without impairing mortgagee's  
81 right to sue; or it may pay off the mortgage debt and require  
82 an assignment thereof and of the mortgage. Other provisions

84 relating to the interests and obligations of such mortgagee may  
85 be added hereto by endorsement in writing.  
86 Pro rata liability. This Company shall not be liable for a greater  
87 proportion of any loss than the amount  
88 hereby insured shall bear to the whole insurance covering the  
89 property against the peril involved, whether collectible or not.  
90 Requirements in The insured shall give immediate written  
91 case loss occurs. notice to this Company of any loss, protect  
92 the property from further damage, forthwith  
93 separate the damaged and undamaged personal property, put  
94 it in the best possible order, furnish a complete inventory of  
95 the destroyed, damaged and undamaged property, showing in  
96 detail quantities, costs, actual cash value and amount of loss  
97 claimed; and within sixty days after the loss, unless such time  
98 is extended in writing by this Company, the insured shall render  
99 to this Company a proof of loss, signed and sworn to by the  
100 insured, stating the knowledge and belief of the insured as to  
101 the following: the time and origin of the loss, the interest of the  
102 insured and of all others in the property, the actual cash value of  
103 each item thereof and the amount of loss thereto, all encum-  
104 brances thereon, all other contracts of insurance, whether valid  
105 or not, covering any of said property, any changes in the title,  
106 use, occupation, location, possession or exposures of said prop-  
107 erty since the issuing of this policy, by whom and for what  
108 purpose any building herein described and the several parts  
109 thereof were occupied at the time of loss and whether or not it  
110 then stood on leased ground, and shall furnish a copy of all the  
111 descriptions and schedules in all policies and, if required, verified  
112 plans and specifications of any building, fixtures or machinery  
113 destroyed or damaged. The insured, as often as may be reason-  
114 ably required, shall exhibit to any person designated by this  
115 Company all that remains of any property herein described, and  
116 submit to examinations under oath by any person named by this  
117 Company, and subscribe the same; and, as often as may be  
118 reasonably required, shall produce for examination all books of  
119 account, bills, invoices and other vouchers, or certified copies  
120 thereof if originals be lost, at such reasonable time and place as  
121 may be designated by this Company or its representative, and  
122 shall permit extracts and copies thereof to be made.  
123 Appraisal. In case the insured and this Company shall  
124 fail to agree as to the actual cash value or  
125 the amount of loss, then, on the written demand of either, each  
126 shall select a competent and disinterested appraiser and notify  
127 the other of the appraiser selected within twenty days of such  
128 demand. The appraisers shall first select a competent and dis-  
129 interested umpire; and failing for fifteen days to agree upon  
130 such umpire, then, on request of the insured or this Company,  
131 such umpire shall be selected by a judge of a court of record in  
132 the state in which the property covered is located. The ap-  
133 praisers shall then appraise the loss, stating separately actual  
134 cash value and loss to each item; and, failing to agree, shall  
135 submit their differences, only, to the umpire. An award in writ-  
136 ing, so itemized, of any two when filed with this Company shall  
137 determine the amount of actual cash value and loss. Each  
138 appraiser shall be paid by the party selecting him and the ex-  
139 penses of appraisal and umpire shall be paid by the parties  
140 equally.  
141 Company's It shall be optional with this Company to  
142 options. take all, or any part, of the property at the  
143 agreed or appraised value, and also to re-  
144 pair, rebuild or replace the property destroyed or damaged with  
145 other of like kind and quality within a reasonable time, on giv-  
146 ing notice of its intention so to do within thirty days after the  
147 receipt of the proof of loss herein required.  
148 Abandonment. There can be no abandonment to this Com-  
149 pany of any property.  
150 When loss The amount of loss for which this Company  
151 payable. may be liable shall be payable sixty days  
152 after proof of loss, as herein provided, is  
153 received by this Company and ascertainment of the loss is made  
154 either by agreement between the insured and this Company ex-  
155 pressed in writing or by the filing with this Company of an  
156 award as herein provided.  
157 Suit. No suit or action on this policy for the recovery  
158 of any claim shall be sustainable in any  
159 court of law or equity unless all the requirements of this policy  
160 shall have been complied with, and unless commenced within  
161 twelve months next after inception of the loss.  
162 Subrogation. This Company may require from the insured  
163 an assignment of all right of recovery against  
164 any party for loss to the extent that payment thereof is made  
165 by this Company.

# EXTENDED COVERAGE ENDORSEMENT

PERILS OF WINDSTORM, HAIL, EXPLOSION, RIOT, RIOT ATTENDING A STRIKE, CIVIL COMMOION, AIRCRAFT, VEHICLES, SMOKE, EXCEPT AS HEREINAFTER PROVIDED:

e for extended coverage .293

In consideration of \$ 27.30 premium, and subject to provisions and stipulations (hereinafter referred to as "provisions") herein and in the policy to which this endorsement is attached, including riders and endorsements thereon, the coverage of this policy is extended to include direct loss by WINDSTORM, HAIL, EXPLOSION, RIOT, RIOT ATTENDING A STRIKE, CIVIL COMMOION, AIRCRAFT, VEHICLES, AND SMOKE.

This endorsement does not increase the amount or amounts of insurance provided in the policy to which it is attached.

If this policy covers on two or more items, the provisions of this endorsement shall apply to each item separately.

**Substitution of Terms:** In the application of the provisions of this policy, including riders and endorsements (but not this endorsement), to the perils covered by this Extended Coverage Endorsement, wherever the word "fire" appears there shall be substituted therefor the peril involved or the loss caused thereby, as the case requires.

**Fall of Building Clause:** The Fall of Building Clause, if any, in the policy to which this endorsement is attached shall not apply when the fall is caused by any of the perils included in this endorsement.

**Apportionment Clause:** This Company shall not be liable for a greater proportion of any loss from any peril or perils included in this endorsement than (1) the amount of insurance under this policy bears to the whole amount of fire insurance covering the property, whether valid or not and whether collectible or not, and whether or not such other fire insurance covers against the additional peril or perils insured hereunder; (2) nor for a greater proportion than the amount of insurance under this policy bears to the amount of all insurance, whether valid or not and whether collectible or not, covering in any manner such loss; furthermore, if there be insurance other than fire insurance covering any one or more of the perils causing loss hereunder, covering specifically any individual unit of property involved in the loss, only such proportion of the insurance under this policy shall apply to such unit specifically insured, as the value of such unit shall bear to the total value of all the property covered under this policy, whether such other insurance contains a similar clause or not.

**Glass Clause:** It is expressly stipulated as applicable to all perils included in this endorsement that only such proportion of the insurance under this policy on any building covers on plate, stained, leaded or cathedral glass therein as the value of such glass which is damaged bears to the total value of said building.

**War Risk Exclusion Clause:** This Company shall not be liable for loss by any of the perils insured against in this endorsement caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power.

**Waiver of Policy Provisions:** A claim for loss from perils included in this endorsement shall not be barred because building is not on ground owned by the insured in fee simple, factory operations have ceased, of change of occupancy, of existence of encumbrance, of factory operations at night, nor because of vacancy or unoccupancy.

Attached to and forming part of Policy No. 9961

Name Insurance Company

Grand Falls, Montana

Name of Insurance Company

ed at its

Agency. Dated Jan. 1, 1945



FIDELITY & BOWDITCH, INC.

BY

Agent

302 JULY 1944

THE PROVISIONS PRINTED ON THE BACK OF THIS FORM ARE HEREBY REFERRED TO AND MADE A PART HEREOF.

WHEN THIS ENDORSEMENT IS ATTACHED TO ONE FIRE POLICY, THE INSURED SHOULD SECURE LIKE COVERAGE ON ALL FIRE POLICIES COVERING THE SAME PROPERTY

Exhibit "A" - Page 2

**PROVISIONS REFERRED TO IN AND MADE PART OF THIS FORM (No. 202)**

**Provisions Applicable Only to Windstorm and Hail:** This Company shall not be liable for loss caused directly or indirectly by (a) frost or cold weather or (b) snowstorm, tidal wave, high water or overflow, whether driven by wind or not.

This Company shall not be liable for loss to the interior of the building or the insured property therein caused by rain, snow, sand or dust, whether driven by wind or not, unless the building insured or containing the property insured shall first sustain an actual loss to roof or walls by the direct force of wind or hail and then shall be liable for loss to the interior of the building or the insured property therein as may be caused by rain, snow, sand or dust entering the building through openings in the roof or walls made by direct action of wind or hail or (b) water from a sprinkler equipment or other piping, unless such equipment or piping be damaged as a direct result of wind or hail.

Unless liability therefor is assumed in the form attached to this policy, or by endorsement hereon, this Company shall not be liable for damage to the following property: (a) grain, hay, straw or other crops outside of buildings or (b) windmills, windpumps or their towers, cloth awnings, signs, metal smokestacks, temporary or board roof additions, or (c) buildings (or their contents) in process of construction or reconstruction unless entirely enclosed and under roof with all outside doors and windows permanently in place.

**Provisions Applicable Only to Explosion:** This Company shall not be liable for loss by explosion originating within steam boilers, steam pipes, steam turbines, steam engines, fly-wheels, located in the building(s) insured or in building(s) containing the property insured.

Any other explosion clause made a part of this policy is superseded by this endorsement.

**Provisions Applicable Only to Riot, Riot Attending a Strike and Civil Commotion:** Loss by riot, riot attending a strike or civil commotion shall include direct loss by acts of striking employees of the owner or tenant(s) of the described building(s) while occupied by said striking employees and shall also include direct loss from pillage and looting occurring during and at the immediate place of a riot, riot attending a strike or civil commotion. This Company shall not be liable, however, for loss resulting from damage to or destruction of the described property owing to change in temperature or interruption of operations resulting from riot or strike or occupancy by striking employees or civil commotion, whether or not such loss, due to change in temperature or interruption of operations, is covered by this policy as to other perils.

**Provisions Applicable Only to Loss by Aircraft and Vehicles:** Loss by "aircraft" includes direct loss by objects falling therefrom. The term "vehicles," as used in this endorsement, means vehicles running on land or tracks. This Company shall not be liable, however, for loss (a) by any vehicle owned or operated by the insured or by any tenant of the described premises; (b) to aircraft or vehicles including contents other than loads of aircraft or vehicles in process of manufacture or for sale; (c) to fences, driveways, sidewalks or lawns.

**Provisions Applicable to Smoke:** The term "smoke" as used in this endorsement means only smoke due to a sudden, unusual and faulty operation of any heating or cooking unit, only when such unit is connected to chimney by a smoke pipe, and while in or on the premises described in this policy, excluding, however, smoke from fireplaces or industrial apparatus.

**Provisions Applicable Only when this Endorsement is attached to a Policy Covering Business Interruption (Use and Occupancy), Extra Expense, Rents, Leasehold Interest or Profits and Commissions:** When this endorsement is attached to a policy covering Business Interruption (Use and Occupancy), Extra Expense, Rents, Leasehold Interest, Profits and Commissions, the term "direct," as applied to loss, means loss, as limited and conditioned in such policy, resulting from direct loss to described property from perils insured against, and, while the business of the owner or tenant(s) of the described building(s) is interrupted by a strike at the described location, this Company shall not be liable for any loss owing to interference by any person(s) with rebuilding, repairing or replacing the property damaged or destroyed or with the resumption or continuation of business.

**"COUNTY OF CASCADE, STATE OF MONTANA"**

As is now or may hereafter be constituted.  
For Account of Whom It May Concern.

Loss, if any, to be adjusted with and payable to Board of County Commissioners, Cascade County, Montana  
\$ 10,000.00

On all property of every kind and description now existing or hereafter acquired, including such property on which by the printed conditions of this policy liability must be specifically assumed. Excepting such property as hereinafter specifically excluded, all while situate in, on, or attached to the premises owned and/or occupied by the insured at the following locations:

1. Court House Premises—Block Bounded by 2nd Avenue North, North 4th Street, 3rd Avenue North and North 5th Street.
2. County Jail Premises—Southwest Corner 3rd Avenue North and North 4th Street.
3. County Shops Premises—Block Bounded by 6th Avenue North, North 8th Street, 9th Avenue North and North 9th Street.
4. County Shops Premises, New—3rd Street Northwest, Blocks 1006 and 1007.
5. Fair Grounds Premises—Blocks Bounded by 1st Avenue, N. W., 3rd Street N. W., City Limits and 8th Street N. W.
6. Old Peoples Home, Youths Home, Library (Nursery) and Hospital—Block 504 10th Alley South.
7. Civic Center Bldg. (Furniture)—Blocks 433 and 434 All above in Great Falls, Montana.
8. Outside Jail Premises—Stockett, Sand Coulee and B-11.
9. Machine Shed—No. 45 W/S Anaconda Road, Bell, Montana

In Cascade County, Montana

**"EXTENSION CLAUSE":** This insurance is extended to cover property as described and all materials, supplies and equipment to be used for repairing, making alterations and additions to the property insured hereunder while on and/or under sidewalks, platforms, alleyways and/or open spaces, provided such property be located within fifty (50) feet of said premises, and in on cars and/or vehicles within three hundred (300) feet of said premises.

**"TRUST AND CONVEYANCE CLAUSE":** This insurance shall also apply to and cover property of others for which the insured may be legally liable or for which liability is at any time assumed by the insured, and shall also apply to and cover the insured's interest in property owned in whole or in part by others, including all material, labor and charges furnished, performed or incurred by the insured or at the expense of the insured in connection with the property on which loss is sustained. PROVIDED HOWEVER, that if such property, material, labor and/or charges be covered by more specific insurance then insurance under this policy shall attach and cover only after the liability of such more specific insurance has been exhausted and shall then cover such and only such loss or damage as may exceed the amount due from such more specific insurance.

**"GENERAL EXCLUSIONS":** It is hereby understood and agreed that the following are not covered by this policy and are therefore not to be included in the application of the average and distribution clauses: (1) Excavations, grading and filling; (2) Masonry foundations, piers and retaining walls below the level of the lowest basement floor or where there is no basement, which are below the level of the ground; (3) Piping, wiring, tanks and equipment when underground; (4) Architect's fees; (5) Paving, curbing, side walks, driveways, lawns, garages, trees and shrubs; (6) Merchandise held for sale; (7) Land values; (8) Motor vehicle, and trucks and their trailers, rollers, sweepers, sprinklers, mowers, steam shovels, ditch diggers and other similar slow moving equipment; (9) Records consisting of Judicial, Tax, Title, Vital Statistics and other similar documents and records constituting the Public Records of the County of Cascade, State of Montana, Accounts, Bills, Currency, Deeds, Evidences of Debt, Money, Notes or Securities.

**"AVERAGE CLAUSE":** It is expressly stipulated and made a condition of the contract, that, in event of loss, this Company shall be liable for no greater proportion thereof than the amount hereby insured bears to ninety per cent (90%) of the actual value of the property described herein at the time when such loss shall happen, nor for more than the proportion which this policy bears to the total insurance.

**"DISTRIBUTION CLAUSE":** It is hereby agreed that at all times this policy shall attach on each building and/or structure on contents of each building and/or structure, on contents of each yard in the proportion that the value of each such building and/or structure, of the contents of each such building and/or structure, of contents in each yard bears to the aggregate value of all such buildings, structures and contents.

**"WATCHMAN WITH APPROVED RECORDING SYSTEM OR WATCHDOCK WARRANTY, NIGHTS ONLY":** (Applying to Fair Grounds Premises only). Warranted by the insured that due diligence will at all times be used by the insured to maintain one or more watchmen (with approved recording system or watch clock) who shall keep a continuous watch in and about the within described premises during the entire night, whether the premises herein described be open for business or shut down or not in operation. A breach of this warranty suspends this insurance during such breach.

**"BREACH OF WARRANTY OR CONDITION CLAUSE":** If a breach of any warranty or condition contained in any rider attached to this policy shall occur, which breach by the terms of such warranty or condition, shall operate to suspend or avoid this insurance, it is agreed that such suspension or avoidance due to such breach shall be effective only during the continuance of such breach and then only to the building or the division or contents therein or other separate location to which such warranty or condition has reference and in respect of which such breach occurs.

**"PERMITS":** Permission is hereby specifically granted: (1) For existing and increased hazards and to make such changes in the use and occupancy of the premises as may be desired; (2) To be and remain vacant and/or unoccupied and to shut down and/or cease operations without limit of time; (3) Prior to any loss the insured may, without prejudice to this insurance, release any person, corporation, or others from liability for loss or damage caused by act or neglect of themselves or their employees, agents or representatives. The provisions of this paragraph shall supersede and abrogate any prohibition thereof contained in the printed conditions of this policy.

**"SPECIAL AGREEMENTS":** This insurance shall not be prejudiced by reason of any of the following conditions. (1) If notice of sale be given in regard to any property insured hereunder. (2) If any contract of sale thereof be executed. (3) If any error or omission in regard to the name and title or the description and location of buildings insured hereunder. (4) Any act or neglect of the owner of the building (if insured hereunder is not the owner) or of any occupant of the within described premises other than the insured, when such act or neglect is not within the control of the insured, named herein. The provisions of this paragraph shall supersede and abrogate any prohibition thereof contained in the printed conditions of this policy.

**"AUTOMATIC REINSTATEMENT OF LOSSES":** It is a condition of this insurance that in the event of any loss payment under this policy not exceeding one hundred dollars (\$100.00) the amount of insurance under this policy shall not be reduced.

**"ELECTRICAL APPARATUS CLAUSE":** If electrical appliances or devices of any kind, including wiring, are covered under this policy, this company shall not be liable for any electrical injury or disturbance to the said electrical appliances, devices or wiring caused by accidentally generated electrical currents, unless fire ensues, but if fire does ensue, then in consideration of the rate of premium at which this policy is written, this company shall be liable for its proportion of loss caused by such ensuing fire.

**"ACCUMULATIVE LOSS CLAUSE":** In the event of loss, which in the aggregate does not exceed \$1,000.00, the insured may, after giving due notice of loss to this Company as provided by the policy, immediately make all necessary repairs. The insured will not be required to furnish proof of loss until the aggregate amount of such loss or losses exceeds the sum of \$1,000.00 provided that the insured shall execute and furnish proof of loss for the accumulated losses at the end of each policy year.

Attached to Policy No. 9961 of the \_\_\_\_\_ Insurance Company

Agency at Great Falls, Montana Dated Jan. 1, 1945

[Endorsed: Filed July 31, 1947.

FRANK & BULLING, INC. Agent  
BY:



Thereafter, on October 14, 1947, Motion to Dismiss and Notice of Hearing Motion to Dismiss were duly filed herein, in the words and figures following, to-wit: [16]

[Title of District Court and Cause.]

MOTION TO DISMISS THE HOME INSURANCE COMPANY, BOTH INDIVIDUALLY AND IN ITS REPRESENTATIVE CAPACITY, AS A PARTY PLAINTIFF

Comes Now the defendant, United States of America, by and through John B. Tansil, United States Attorney, and Franklin A. Lamb, Assistant United States Attorney, in and for the District of Montana, and respectfully moves this Court for an order dismissing The Home Insurance Company, both individually and in its representative capacity, as a party plaintiff, upon the following grounds and for the following reasons:

I.

That the Federal Tort Claims Act of August 2, 1946, does not provide a remedy for a claim based upon the subrogation rights and prohibits the prosecution of such a claim by a subrogee.

II.

That this action and the alleged cause of action of this plaintiff is in conflict with and prohibited

by the provisions of the Assignment of Claims Act (31 U.S.C. 203).

Dated this 13th day of October, 1947.

JOHN B. TANSIL,

Attorney for the United States, in and for the  
District of Montana.

FRANKLIN A. LAMB,

Assistant Attorney for the United States, in and  
for the District of Montana. [17]

### NOTICE OF MOTION

To Cascade County, Montana, and The Home Insurance Company, New York, plaintiffs, and H. R. Eickemeyer and La Rue Smith, Jr., Attorneys at Law, Ford Building, Great Falls, Montana, Notice:

You, and each of you, will please take notice that the undersigned will bring the above motion on for hearing before the above-entitled Court in the courtroom of the United States District Court in and for the District of Montana, at Great Falls, Montana, on the first day of the next regular term of said Court, or as soon thereafter as counsel may be heard.

JOHN B. TANSIL,

Attorney of the United States, in and for the  
District of Montana.

FRANKLIN A. LAMB,

Assistant Attorney of the United States, in and  
for the District of Montana.

[Endorsed]: Filed Oct. 14, 1947. [18]



Thereafter, on February 25, 1948, Decision and Order Dismissing Action of The Home Insurance Company was duly filed, entered and noted in the Civil Docket, being in the words and figures following, to-wit: [19]

In the District Court of the United States, District  
of Montana, Great Falls Division

No. 993

CASCADE COUNTY, MONTANA, and THE  
HOME INSURANCE COMPANY, New York,  
on Behalf of Itself and All Other Insurance  
Companies, Similarly Situated,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,  
Defendant.

### DECISION AND ORDER

The action is commenced under the provisions of the Federal Tort Claims Act, 28 U.S.C.A. 931. Plaintiffs allege that on August 9, 1946, in Cascade County, Montana, certain employees and officers of the United States, constituting the personnel of the United States Army Air Forces, flew three A-26 bomber type aircraft in such a negligent manner that one of them crashed into a barn, the property of the County, located on the Cascade County fair-grounds, and caused a fire which entirely destroyed the property of the County, to its damage in the

sum of \$18,685.00; that prior to the loss plaintiff County had insured all of its property, including the barn, with the plaintiff Home Insurance Company and seventy-one other insurance companies; that after the fire the insurance companies paid to the County \$8,550.00 by reason of the loss, the amount being prorated among the various insurance companies, and alleges that by reason of the payments made to the County under the insurance policies, each of them are subrogated to the rights of the plaintiff County against the United States because of the loss and damage to the property of the County, and as such subrogees sue, the Home Insurance Company suing on behalf of itself and the other seventy-one insurance companies similarly situated. The defendant moves to dismiss as [20] to the plaintiff Home Insurance Company, both in its individual and representative capacity, upon the grounds (a) that the Federal Tort Claims Act does not provide a remedy for a claim based upon the subrogation rights and prohibits the prosecution of such a claim by a subrogee, and (b) that this action is in conflict with and prohibited by the provisions of the Assignment of Claims Act, 31 U.S.C. 203.

The act under which the action is brought provides: “\* \* \* the United States District Court for the district wherein the plaintiff is a resident, or wherein the act or omission complained of occurred \* \* \* sitting without a jury, shall have jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only,

accruing on and after January 1, 1945, on account of damage to or loss of property \* \* \* caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury \* \* \* in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims, to the same claimants, in the same manner, and to the same extent, as a private individual under like circumstances, \* \* \*."

In passing this act on August 2, 1946, Congress caused a radical change in the law to be made insofar as recovery might be had against the United States by reason of loss or damage caused by the negligence of an officer and employee of the United States. Prior to this act, the only relief in such cases was by either a private relief bill passed by Congress in individual cases, or by an act of Congress consenting that the United States might be sued in the particular case in a particular United States District Court and usually limiting the amount for which judgment [21] could be entered against the United States in the event the plaintiff in the action were successful. The Congress no doubt was fully conversant, in considering and passing the act, that it would thereby open up a vast field of litigation against the United States, and potentially greatly increase the expense of the Gov-

ernment in the payment of judgments which reasonably could be expected to be rendered against the United States in such actions. Therefore, it must be presumed Congress chose the language it employed in the act carefully, and with the purpose and intent of expressing exactly under what circumstances the United States would give its consent to be sued, and by whom the United States gave its consent to be sued. As the statute is a consent to be sued statute on behalf of the United States, in considering the questions presented by the motion, it must be borne in mind that the United States can only be sued by its own consent, *U. S. v. Sherwood*, 312 U. S. 584; that the consent can be manifest only by the Congress of the United States, *U. S. v. Shaw*, 309 U. S. 495; Congress has the right to prescribe the terms and conditions upon which the United States may be sued, *Minnesota v. U. S.*, 305 U. S. 382; that the suit may not be maintained against the United States if not clearly within the statute of consent and the statutes granting the right to sue the United States will be strictly construed, *U. S. v. Sherwood*, *supra*. "The sovereignty of the United States raises a presumption against its suability, unless it is clearly shown; nor should a Court enlarge its liability to suit beyond what the language requires." *Eastern Transportation Co. v. U. S. et al.*, 272 U. S. 675.

In *Caledonia Insurance Company v. Northern Pacific Railway Company*, 32 Mont. 46, 79 Pac. 544, the Supreme Court of Montana said: "If insured buildings or other property are destroyed through

the fault or negligence of some person other than the owner, the insurance company, upon payment of the loss, will be [22] subrogated to the right of the owner to recover from the wrongdoer. \* \* \* The rights of the insurer against the wrongdoer can be no greater than those of the insured, and its recovery will be limited to the amount which it has paid on the loss." See also *Gaugler et al. v. Chicago, M. & P. S. Ry. Co.*, 197 Fed. 79.

It does not follow that because the Insurance Company becomes the owner of the insured's cause of action to the extent of the payment made by it to the insured and thus may sue the original tortfeasor, that it may sue the United States as the tortfeasor, for irrespective of the laws of the State of Montana granting the cause of action no suit may be maintained upon it against the United States unless the United States has consented to be sued. The Insurance Company claims that the consent is granted by the statute under its express terms, where it is provided that the United States may be sued "under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury or death in accordance with the law of the place where the act or omission occurred \* \* \* to the same claimants, in the same manner and to the same extent as a private individual under like circumstances \* \* \*." (Underscoring mine.) The contention cannot be sustained when the act in its entirety is considered. The consent to be sued granted by



the United States is on account of damage or loss to property caused by negligence of the employees of the United States. By its consent it creates a cause of action that did not exist before. A cause of action is granted to the owner of the property because of his ownership of the property. It accrues in its entirety immediately upon the damage or loss of the property and by reason thereof, and the damage is that sustained by the owner of the property, here Cascade County. The measure of the damage is the value of the property damaged or destroyed. No loss was sustained by the Insurance Company because of the negligent destruction of the property. If the Insurance Company sustained a loss, it was because [23] of the contract entered into between itself and the owner of the property, and no right of action of any kind under the State law accrued to the Insurance Company until it made a payment under its contract to the insured. The recovery sought to be made by the Insurance Company is not for the damage to or loss of the property itself, or the amount thereof, but for the moneys paid out by it to the owner of the property under its contract with him, and its measure of claimed recovery is not the amount of the damage is that sustained by the owner of the but the amount of money it paid, even though the loss to the owner of the building, recoverable by him, is in a far greater amount. No right of action is granted by the statute to the Insurance Company at all. Any right of action that it has under the State law it derives from the owner of the property

as a result of its contract with him and the payment made and is a portion of the right of action granted to the owner of the property by Congress, which the Insurance Company seeks to prosecute in its own name. The Insurance Company contends that by the use of the words claimant and claimants it is embraced within the statute as one of a class that Congress has consented may sue. The language is not an enlargement of the language preceding it, but a limitation upon it and limits the consent to be sued by the owner only under circumstances where the owner might sue a private person under the law of the State and the liability of the United States to the owner is exactly the same, no greater or no less, as the liability of private individuals under the same circumstances, except that if private individuals under the same circumstances, under the law of the State, would be liable for interest prior to judgment or punitive damages, the United States is not liable. In construing Section 203, Title 31, U.S.C.A., the Assignment of Claims Act against the United States, the Supreme Court said in *National Bank of Commerce v. Downie*, 218 U. S. 353: "It" (the statute) "strikes at every derivative interest in whatever form acquired, [24] and incapacitates every claimant upon the government from creating an interest in the claim in any other than himself." (Emphasis the Court.) It thus appears that Congress, in using the words claimant and claimants in the statute referred to and meant the original owner of the claim and not one who derives

all or a part of the claim from the original owner. The Insurance Company contends that by Section 943, Title 28, exempting specific claims from the operation of the act, Congress manifested its intent that all other claims mentioned therein were within the act, including claims by subrogees under the maxim *expressio unius est exclusio alterius*, citing *Johnson v. Southern Pacific Company*, 117 Fed. 462. The section does not permit the application of the maxim. Had the section provided that certain claimants could not sue if their loss or damage was caused in the manner set out in any one of the twelve subdivisions of the section, the application of the maxim might be argued, but the section does not so provide. The section specifically provides that consent is not granted for anyone to sue the United States, i.e., become a claimant if the loss or damage is caused by any of the acts of the government employees set out in the twelve subdivisions of the section. It is all inclusive and prevents anyone from suing. The section is one of restriction upon the consent granted by Section 931 and not one of enlargement.

It is urged by the defendant that to permit the action to be maintained by the Insurance Company would violate Section 203, Title 31, U. S. C. A., which provides where material: "Assignments of claims void. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney,



orders, or other authorities for receiving payment of any claim upon the United States, or of any except as provided in section 204 of this title, shall be absolutely null and void, unless they are freely made and executed in the presence of at least [25] two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."

One of the policies of insurance is attached to the complaint as an exhibit and it is said that all of them sued on are similar as to form, and as a part of the policy it is provided: "Subrogation. This company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this company."

Thus the policy, by its terms, provides for a subrogation through the voluntary assignment of the claimant of his cause of action to the insurance company. If this provision of the contract is carried out as between the parties and the assignment made, unquestionably it would violate the provisions of the statute. Should the insured, after receiving payment under the contract of insurance, refuse to make the formal assignments, under the doctrine that equity considers that done that ought to be done, the insurer would still be subrogated, which would still result in a violation of the statute, for as said by the Supreme Court in *National Bank of Commerce v. Downie, Trustee*, 218 U. S. 345, in considering the statute and its terms: "It would seem to be impossible to use

language more comprehensive than this. It embraces alike legal and equitable assignments."

The Insurance Company does not press its right under the contract, but relies upon the law of the State and the decision of the Supreme Court of the State in *Caledonia Insurance Company v. Northern Pacific Railway Company*, supra, wherein the Supreme Court, in holding an insurer subrogated to the right of the insured upon making payment, in part said: "The next inquiry is, was such cause of action assignable? For subrogation is merely an equitable assignment or an assignment by operation of law." The result arrived at by the Supreme Court of the State was through the construction of Section 1351 of the Civil Code of 1895, now Section [26] 6805, Revised Codes of Montana, 1935, which provides: "Transfer and survivorship. A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. Upon the death of the owner it passes to his personal representatives, except where, in the cases provided in the Code of Civil Procedure, it passes to his devisees or successor in office."

In *State ex rel Stiefel v. District Court of the Ninth Judicial District*, 96 Pac. 337, the Supreme Court of Montana held that under this section an assignment may be made without writing, and if the assignment is, as the State Supreme Court says, merely an equitable assignment or an assignment by operation of law, it is clear that the law is put

into operation by the voluntary act of the insured in accepting payment from the insurer, the payment not only operating as a performance on the part of the insurer to the insured under its contract, but also as a purchase of the cause of action the insured might have had against another directly responsible for the loss of the property insured, to the extent of the payment made by the insurer. The Insurance Company relies upon the decisions of the Supreme Court holding that a debt due from the United States to a decedent may be paid to an administrator, *Wyman v. U. S.*, 109 U. S. 654; a debt due from the United States to a minor child may be paid to a guardian, *Taylor v. Bemiss*, 110 U. S. 42. These cases are not in point as under those circumstances there is no assignment made of the claim. Neither is it an assignment of the claim if the proceeds of the claim are paid to a proper custodian in insolvency or bankruptcy proceedings pending in a competent court for the purpose of paying the debts of the claimant, *Butler v. Goreley*, 146 U. S. 303, *Price v. Forrest*, 173 U. S. 410. The Insurance Company relies upon general language of the Supreme Court to the effect that the Section does not embrace cases where there has been a transfer of title by operation of law, *Western Pacific Company v. U. S.*, 268 U. S. 271. The language of the Supreme Court is general, but the language of any [27] Court, in its opinion, must be read in the light of the facts of the particular case before the Court and to which all of its language is considered addressed. The

facts in that case were that the plaintiff in the action, Western Pacific Company, was the successor in interest of the Western Pacific Railway. Receivers of the property of the said Western Pacific Railway had been appointed in a federal district court in California in a suit brought against it there and the sale was made of the claim by the receivers in said suit pursuant to an order of the court to the plaintiff Western Pacific Company. The operation of law there, under which title passed, was purely involuntary as far as the owner of the claim was concerned. It cannot be presumed that by the use of the language the Supreme Court laid down the general rule that all assignments by operation of law are not within the statute. Certainly it cannot be contended that where using the language in any case the Court had in mind an assignment of an action in tort against the United States, as there was no such action in anyone prior to the passage of the Federal Tort Claims act. The Supreme Court has made its meaning clear as to that language in *United States v. Gillis*, 95 U. S. 407, where it says, in considering the statute: " 'There are devolutions of title by force of law, without any act of parties, or involuntary assignments, compelled by law' to which this statute did not apply." The sale of the property by the receivers appointed by the Court in the action against the Railway Company is an illustration of a devolution of title by force of law without any act of the parties and if it is said that it results in an assignment it is an involuntary assignment compelled by

law, but here any title the Insurance Company may have to any part of the County's cause of action, or any assignment it may have is not involuntary or without any act of the parties, but is purely voluntary and comes into operation by reason of the act of the parties in the contract freely and voluntarily entered into between them. The Supreme Court, early in a leading case, stated [28] that one of the reasons for the passage of the statute was to protect the Government from problems arising as a result of the multiplication of the number of persons with whom the United States must deal. *Goodman v. Niblack*, 102 U. S. 556. Here the so-called assignment of a portion of the claimant's cause of action increases the number of persons with which the government must deal to 72.

It necessarily follows from what is said that the motion of the defendant to dismiss the action of the plaintiff Home Insurance Company, both individually and in its representative capacity should be sustained upon each of the grounds set out in the motion, and,

Therefore, It Is Ordered and this does order that the action of the Home Insurance Company against the defendant, both individually and in its representative capacity, be and the same hereby is dismissed.

Done and dated this 25th day of February, 1948.

R. LEWIS BROWN,

United States District Judge.

[Endorsed]: Filed Feb. 25, 1948. [29]

Thereafter, on March 23, 1948, Notice of Appeal was duly filed herein, as follows, to-wit:

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT  
COURT OF APPEALS

Notice Is Hereby Given that Cascade County, Montana, and The Home Insurance Company, New York, on behalf of itself and all other insurance companies, similarly situated, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the Order of the District Court of the United States, District of Montana, Great Falls Division, entered in this action on 25 February, 1948, dismissing the action of The Home Insurance Company, both individually and representing all other insurance companies similarly situated, against the defendant, The United States of America.

Dated this 11th day of March, 1948.

/s/ H. R. EICKEMEYER,  
429 Ford Building,  
Great Falls, Montana,  
Attorney for Appellants.

/s/ LaRUE SMITH, JR.,  
411 Ford Building,  
Great Falls, Montana,  
Attorney for Appellants.

[Endorsed]: Filed March 23, 1948. [31]



Thereupon, on March 23, 1948, a copy of Notice of Appeal was mailed to the attorney for the defendant herein, the Clerk's docket entry of such mailing being as follows, to-wit: [32]

[Title of District Court and Cause.]

#### CLERK'S DOCKET ENTRY

March 23, 1948. Mailed copy of notice of appeal to United States Attorney, Billings, Montana. [33]

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Thereafter, on March 31, 1948, Designation of Contents of Record on Appeal was duly filed herein, in the words and figures following, to-wit: [34]

[Title of District Court and Cause.]

#### DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellants designate the following portions of the record, proceedings and evidence to be contained in the record on appeal in this case:

1. Complaint.
2. Defendant's motion to dismiss The Home Insurance Company, both individually and in its representative capacity as a party plaintiff.
3. Notice of hearing on the above motion.
4. Judgment and order dismissing The Home Insurance Company, both individually and in

its representative capacity, as a party plaintiff.

5. Notice of appeal.

6. The designation.

Dated this 31st day of March, 1948.

/s/ H. R. EICKEMEYER,

/s/ LaRUE SMITH, JR.,

Attorneys for Appellants.

Service of foregoing Designation and receipt of a copy thereof this 31st day of March, 1948.

JOHN B. TANSIL,

U. S. Attorney.

FRANKLIN A. LAMB,

Ass't. U. S. Attorney.

[Endorsed]: Filed March 31, 1948. [35]

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In the District Court of the United States in and for the District of Montana, Great Falls Division.

### CERTIFICATE OF CLERK

United States of America,

District of Montana—ss.

I, H. H. Walker, Clerk of the District Court of the United States for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting



of 36 pages, numbered consecutively from 1 to 36 inclusive, constitutes a full, true and correct transcript of all portions of the record in case number 993, Cascade County, Montana, et al, versus The United States of America, designated by the parties as the record on appeal therein, as appears from the original records and files of said Court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Eight and 60/100ths Dollars (\$8.60), and have been paid by the appellants.

Witness my hand and the seal of said Court at Great Falls, Montana, this 12th day of April, A. D. 1948.

[Seal]

H. H. WALKER,  
Clerk.

By /s/ ELIZABETH C. McKEE,  
Deputy. [36]

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[Endorsed]: No. 11898. United States Circuit Court of Appeals for the Ninth Circuit. Cascade County, Montana, and The Home Insurance Company, New York, Appellants, vs. United States of America, Appellee. Transcript of Record Upon Appeal from the District Court of the United States for the District of Montana.

Filed: April 16, 1948.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11898

CASCADE COUNTY, MONTANA and THE  
HOME INSURANCE COMPANY, New York,  
on Behalf of Itself and All Other Insurance  
Companies, Similarly Situated,  
Appellants,

vs.

UNITED STATES OF AMERICA,  
Appellee.

STATEMENT of POINT TO BE RELIED  
UPON AND DESIGNATION OF RECORD  
FOR PRINTING

Comes now Cascade County, Montana, a municipal corporation, and The Home Insurance Company, New York, both individually and in its representative capacity on behalf of all other insurance companies similarly situated, appellants in the above entitled cause, and state the point on which they intend to rely in this court in this case is:

That The Home Insurance Company, New York, subrogee of the appellant, Cascade County, Montana, both individually and in its capacity as a representative party for all insurance companies similarly situated, is a necessary and proper party to this cause of action arising under the Federal Tort Claims Act against the United States of America; and the District Court of the United States

of America, District of Montana, Great Falls Division erred in its judgment and order dismissing the action of The Home Insurance Company, New York, both individually and in its representative capacity, against the United States of America;

And further states that the whole of the record as certified to the above entitled court is necessary to consideration of this case on appeal.

Dated this 21st day of April, 1948.

/s/ H. R. EICKEMEYER,

/s/ LaRUE SMITH, JR.,

Counsel for Appellants.

[Affidavit of service by mail attached.]

[Endorsed]: Filed April 23, 1948.

